2006

Curtis J. Beller v. Nannette Rolfe, Director, Utah State Driver License Division : Reply Brief

Utah Court of Appeals

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IN THE UTAH SUPREME COURT

CURTIS J. BELLER, Petitioner/Appellant, and Cross-Appellee, v. NANNETTE ROLFE, Director, Utah State Driver License Division, Respondent/Appellee and Cross-Appellant.	)	Case No. 20060641-SC

REPLY BRIEF OF APPELLEE/CROSS-APPELLANT

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Appeal and Cross-Appeal from the Final Judgment of the Third District Court in and for Salt Lake County, the Honorable Tyrone E. Medley, Presiding

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ORAL ARGUMENT AND PUBLISHED OPINION REQUESTED

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATE STATUTES

CONSTITUTIONAL PROVISIONS

IN THE UTAH SUPREME COURT

CURTIS J. BELLER, Petitioner/Appellant and Cross-Appellee, v. NANETTE ROLFE, Director, Utah State Driver License Division, Respondent/Appellee and Cross-Appellant.	)	Case No. 20060641 - CA

REPLY BRIEF OF APPELLEE/CROSS-APPELLANT ROLFE

This is an appeal and cross-appeal from a final judgment and order of the Third District Court after de novo judicial review, under Utah Code Ann. §§ 63-46b-14 and -15 (West 2004), affirming the Driver License Division's order that suspended Appellant Beller's license for driving under the influence of alcohol.[1] This brief is filed by Cross-Appellant Rolfe solely to reply to matters in the cross-appeal, identified as Issues 4 and 5 in Rolfe's prior brief and responded to in Points V and VI of Beller's response brief as Cross-Appellee. Unlike the other briefs in this case, only this reply brief by Rolfe was prepared and filed after the court of appeals issued its order on July 12, 2007, certifying the case to the Utah Supreme Court.

[1]Rolfe's Suggestion of Mootness, based on the July 20, 2006 expiration of Beller's license suspension period, was denied by the Utah Court of Appeals in an order issued March 27, 2007.

ARGUMENT

I. TRIAL COURTS HAVE NO DISCRETION TO UNNECESSARILY REACH CONSTITUTIONAL ISSUES THAT, AS IN THIS CASE, COULD BE AVOIDED BY RESOLUTION OF NON-CONSTITUTIONAL ISSUES

Driver License Division Director Rolfe contends on cross-appeal that the trial court erroneously ruled on the constitutional issue of whether the traffic stop of Beller violated the Fourth Amendment in light of its determinative, nonconstitutional ruling that the exclusionary rule does not apply in driver license proceedings. Br. of Applee at 26-29. In response, Beller argues that all Utah courts have discretion to do so and that, in any event, Utah's exclusionary rule is mandated by Article I, section 14 of Utah's Constitution. Reply Br. of Applt. at 14-15.

Utah courts have long adhered to the fundamental rule that "a constitutional question is not to be reached if the merits of the case at hand may be fairly determined on other than constitutional issues." *Hoyle v. Monson*, 606 P.2d 240, 242 (Utah 1980); *accord Laney v. Fairview City*, 2002 UT 79, ¶ 7, 57 P.3d 1007; *Peterson v. Coca-Cola USA*, 2002 UT 42, ¶ 21, 48 P.3d 941; *State ex rel. A.R.*, 1999 UT 43, ¶ 13, 782 P.2d 73; *State v. Larson*, 758 P.2d 901, 904 (Utah 1988); *State v. Anderson*, 701 P.2d 1099, 1103 (Utah 1985); *N.D. v. A.B.*, 2003 UT App 215, ¶ 10 n.3, 73 P.3d 971; *Williams v. Jeff*, 2002 UT App 232, ¶ 28 n.6, 57 P.3d 232; *State v. Rodriguez*, 2002 UT App 119, ¶ 4, 46 P.3d 767; *State v. Webster*, 2001 UT App 238, ¶ 30 n.8, 32 P.3d 976; *State v. Jarman*, 1999 UT App 269, ¶ 5, 987 P.2d 1284. This rule serves numerous important policies, such as judicial restraint and the avoidance of advisory opinions. *Hoyle*, 606 P.2d at 242;

State v. Thurman, 846 P.2d 1256, 1262 (Utah1993). Particularly in the context of cases such as this one, it also serves important nonjudicial interests, since a court or agency's determination of a constitutional violation by a state actor can have serious, long-lasting professional and civil liability consequences even though the state actor may not be a party to the proceeding or be represented by counsel there.

Beller cites four cases in which Utah's appellate courts have nonetheless decided a Fourth Amendment claim prior to determining if the federal exclusionary rule applied in the context of the case before it. Reply Br. of Applt. at 14-15. The first is *Sims v. Collection Division*, 841 P.2d 6 (Utah 1992). In *Sims,* the Court addressed whether the exclusionary rule applied in civil tax proceedings to exclude drugs without a drug stamp tax that were seized during an allegedly unconstitutional roadblock. Two members of the Court addressed in dictum the constitutionality of suspicionless roadblocks under the state constitution, *id.* at 8, before addressing the question of the applicability of the state exclusionary rule. A third justice concurred only in the result. *Id.* at 15 (Stewart, J., concurring) ("It is therefor sufficient to hold that federal law requires suppression of the illegally seized evidence. . . ."). Given that a majority of the justices ultimately agreed in *Sims* that the evidence seized had to be excluded from the tax proceeding, there was no reason to apply the *Hoyle* rule: addressing the applicability issue first would not have resulted in resolution of the case on nonconstitutional grounds. Stated otherwise, even if the *Sims* Court had adhered to the order of issues as dictated by *Hoyle*, it would have reached a constitutional question anyway.

Two of the other cases from this Court relied on by Beller, *State v. Lee*, 863 P.2d 49 (Utah App. 1993), and *State v. Koury*, 824 P.2d 474 (Utah App. 1991), are not helpful to him. In *Lee*, applicability of the exclusionary rule was not reached because it was not even raised. Nor was there any nonfrivolous basis on which to do so since the case was a criminal action in which the exclusionary rule unquestionably applied. In *Koury*, also a criminal case, it is apparent that no *Hoyle* argument was raised by the parties concerning the proper order in which the issues of consensual search or private search should be addressed.

These two cases were decided before *A.R.*, which presented issues similar to those presented to the trial court here, *i.e.*, applicability of the federal exclusionary rule in child welfare cases to remedy an alleged Fourth Amendment violation by police and child protection workers. In *A.R.*, the trial court had appropriately declined to reach the constitutional reasonableness of the warrantless home entry because of its determinative conclusion that the exclusionary rule was inapplicable. *Id.* at ¶¶ 2, 12 n.6. The court of appeals reversed that conclusion and held that the exclusionary rule did apply, then it went on to conclude that the search was unreasonable instead of remanding that question to the juvenile court.

On certiorari, this Court first addressed the exclusionary rule issue, concluding: "Only if the rule does apply in this context is it necessary to determine whether the warrantless searches constituted a Fourth Amendment violation." *Id.* at ¶ 13; *accord id.* at ¶ 23. The court of appeals later adhered to *A.R.*'s directive in *Jarman*, 1999 UT App 269,

¶ 5, in which the issue of the constitutionality of the search of a probationer was never reached because the court concluded the exclusionary rule does not apply to probation revocation proceedings.

The fourth case relied upon by Beller, *State ex rel. A.C.C.*, 2002 UT 22, ¶ 9, 44 P.3d 708, does postdate *A.R.* Its deviation from the usual rule against issuing unnecessary constitutional rulings is distinguished by the procedural posture of the case when it reached the Utah Supreme Court. In *A.C.C.*, the trial court had ruled only on the constitutional question, concluding there was no Fourth Amendment violation. *Id.* at ¶¶ 1, 9. On appeal, the court of appeals reversed, holding that the federal exclusionary rule applies in juvenile court delinquency proceedings and that the juvenile probationer did have a reasonable expectation of privacy that would support a claim of Fourth Amendment violation. *Id.* at ¶ 10. On certiorari review, the Utah Supreme Court assumed applicability of the exclusionary rule and concluded that the juvenile probationer had no such privacy interest and thus could not state a Fourth Amendment claim. *Id.* at ¶¶ 14, 28. *A.C.C.* does not stand for the proposition that trial courts have any discretion to decide constitutional claims unnecessarily when a case presents nonconstitutional grounds on which a dispositive resolution could be based. Beller cites no authority for this argument, and Rolfe is aware of none.

A.C.C. 's departure from the rule announced in *Hoyle* and applied in *A.R.* may simply reflect the Court's perceived need in *A.C.C.* to correct erroneous, published Fourth Amendment precedent from the court of appeals on an issue of first impression in order to

clarify that body of law. No such institutional need is present here. On the contrary, this case presents an opportunity to instruct lower courts, once again, that they have no discretion to speculate by issuing unnecessary determinations of constitutional claims.

Next, Beller's fallback position is that, unlike the federal exclusionary rule, which is not mandated by the Fourth Amendment,[2] the state exclusionary rule is "constitutionally mandated" by Article I, section 14 of Utah's Constitution. Thus, he reasons, resolution of the issue of its applicability is not an alternative, nonconstitutional ground on which to resolve this case. Reply Br. of Applt. at 15-16. There are several fatal flaws in this argument, some of which have already been addressed in Rolfe's opening brief.

First, Beller never argued for application of any exclusionary rule–federal or state–at the administrative license revocation hearing, and he thereby waived any such argument. Br. of Applee. at 13-17. Second, Beller argued in the trial court only for application of the federal exclusionary rule because of an alleged Fourth Amendment violation, and the trial court ruled on that question only; thus, he cannot raise for the first time on appeal arguments about the applicability or nature of a state exclusionary rule. Br. of Applee. at 19-21.

Third, as counsel for Beller should know, the issue of whether the state

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[2]*Pennsylvania Bd. of Probation & Parole v. Scott*, 524 U.S. 357, 362-63 (1998) (exclusionary rule is prudentially-created means of deterring Fourth Amendment violations, not a constitutional requirement); *United States v. Calandra*, 414 U.S. 338 (1974) (same).

exclusionary rule is a constitutional requirement of article I, section 14 or a nonconstitutional, judicially-created remedy has never been decided. Two justices in *State v. Larocco*, 794 P.2d 460, 472 (Utah 1991), expressed their nonbinding view that exclusion of evidence is a "necessary consequence" of violations of that constitutional provision. A third justice concurred only in the result, i.e., exclusion of the evidence. *Id.* at 473. The two-justice view in *Larocco* was subsequently adopted by a majority of the Court in *State v. Thompson*, 810 P.2d 415, 419 (Utah 1991), and the same "necessary consequence" language was reiterated in *State v. DeBooy*, 2002 UT 32, ¶ 33 & n.12, 996 P.2d 546, and cited in *State v. Ziegleman*, 905 P.2d 883, 887 (Utah App. 1995). These cases all refer back to *Larocco*, in which the two-justice opinion made it clear that the question of whether Utah's exclusionary rule is constitutionally mandated was not before it:

> The case before us today does not raise any of these questions, nor have they been briefed or argued for this court. We therefore say nothing about the nature of the exclusionary rule (constitutional requirement versus judicial remedy) pursuant to article I, section 14 of the Utah Constitution. We simply hold that it exists.

Larocco, 794 P.2d at 473.

In sum, the instant case presents the prototypical one in which *Hoyle*'s fundamental rule should apply to prevent the trial court from issuing unnecessary declarations on constitutional matters. In light of the trial court's dispositive conclusion on nonconstitutional grounds that the federal exclusionary rule does not apply in driver license proceedings, this Court should vacate that portion of the opinion below that went

on to resolve the constitutional issue of whether there was a Fourth Amendment violation due to lack of reasonable suspicion for the traffic stop.

II. LOUD MUFFLER NOISE AND OBSERVED ALTERATION OF BELLER'S MOTORCYCLE MUFFLER ALONE SUPPORT A REASONABLE SUSPICION JUSTIFYING THE TRAFFIC STOP FOR AN EQUIPMENT VIOLATION

Beller mistakenly argues that Rolfe is raising a new justification for Officer Kendrick's stop of his motorcycle and claims inadequate briefing by Rolfe because no "noise ordinance" has been cited. Reply Br. of Applt. at 18.

Officer Kendrick has consistently stated–at the administrative hearing, in the trial court, and on appeal–that he pulled Beller over because the sound from Beller's motorcycle muffler was excessively loud and in violation of Salt Lake City Ordinance 12.28.100, which prohibits alteration or replacement of a stock muffler that makes the motorcycle's sound louder, as well as operating such a motorcycle. (R. 79 at 5). The ordinance is quoted in Rolfe's responsive brief at page 3, note 1, and Beller admits the ordinance was discussed by Officer Kendrick in the trial court. Reply Br. of Applt. at 19. Although Officer Kendrick was not armed with a decibel meter and did not know what the stock specifications were for Beller's motorcycle, he did know that the "supertrap" style muffler he saw as he came up behind Beller at a stop sign is not stock equipment. (R. 79 at 12).

Finally, Beller argues that Rolfe is indirectly challenging the trial court's findings about Officer Kendrick's "undetailed" experience in assessing the decibel level of stock and altered motorcycle mufflers and that this challenge should not be addressed because

of Rolfe's purported failure to marshal supportive evidence. Reply Br. of Applee. at 18-21.

There are two responses to this argument. First, there is nothing to marshal when the claim is, like Beller's, that certain evidence is absent. Second, Rolfe is not challenging the facts that Officer Kendrick had no machine to scientifically document the noise level of Beller's motorcycle and did not testify as to the number of years he has owned and ridden a motorcycle or about any training he has received in distinguishing the sound level of stock mufflers from that of modified ones. Instead, Rolfe's argument is based on what Officer Kendrick, a motorcycle cop, did hear and did see the night he arrested Beller for driving under the influence. As a matter of law, an extremely loud muffler that Officer Kendrick listened to twice and the unusual supertrap style muffler he saw on Beller's motorcycle, accompanied by unusual plugs and wires suggesting muffler modification, were themselves sufficient to give him reasonable suspicion of an equipment violation. *See* Br. of Applee. at 29-32. Contrary to the trial court's erroneous belief (R. 65), he did not need a portable decibel meter or expert training in how loud various mufflers are in order to have specific, objective facts on which to base this reasonable suspicion.

CONCLUSION

For these reasons and those set forth in her responsive brief, Rolfe asks this Court to vacate that portion of the trial court's Memorandum Decision addressing the constitutionality of the traffic stop.

Respectfully submitted this 26TH day of July, 2007.

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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing REPLY BRIEF OF APPELLEE/CROSS-APPELLANT were mailed, with first-class postage prepaid, this 26TH day of July, 2007, to the following Counsel for Petitioner/Appellant/Cross-Appellee:

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